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No. 82-1841

In The
Supreme Court of the United States
October Term 1982

BOARD OF WATER SUPPLY, CITY AND COUNTY OF HONOLULU, STATE OF HAWAII,
Petitioner,

vs.

ROBERT S. NAKATA, SEIYU NAKATA, CHARLES F. REPPUN, PAUL REPPUN, CLIFFORD WONG and RACHEL HALL,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RONALD ALBU
Legal Aid Society of Hawaii
Windward Branch
47-200 Waihee Road, Room 104
Kaneohe, Hawaii 96744
Telephone: (808) 239-5707
Counsel of Record for Respondents Charles Reppun and Paul Reppun

BOYCE R. BROWN, JR.
BROWN & DURANT
222 Merchant Street
Honolulu, Hawaii 96813
Telephone: (808) 521-5337
Counsel of Record for Respondents Robert Nakata, Seiyu Nakata, Clifford Wong and Rachel Hall

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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STATEMENT OF THE CASE

This action involves a water rights dispute under Hawaii State law between several farmers and the Honolulu Board of Water Supply. Most of the farmers have been using the waters of the Waihee Stream for over 40 years to irrigate their crops. Beginning in 1955 the Board of Water Supply began diverting water from the source of the Waihe'e Stream on the windward side of the Island of Oahu for municipal purposes. The Board gradually increased its diversions over the years and constructed additional facilities for that purpose until, in 1975, the natural flow of the stream was so greatly reduced that these farm-

ers began to suffer severe crop losses. Upon discovering the cause of their injury, the farmers commenced suit in the Circuit Court of Honolulu to require the Board of Water Supply to limit its diversion of water from the Waihe'e Stream in order to leave sufficient water flowing in the stream for the farmers to irrigate their crops.

After a non-jury trial, the Court granted an injunction to the farmers which required the Board of Water Supply to limit and manage its water diversions so as to leave a minimum of 2.7 million gallons of water per day flowing in the Waihe'e Stream for the farmers' agricultural irrigation requirements. Both sides appealed.

On appeal, the Hawaii Supreme Court held in *Reppun v. Board of Water Supply,* 65 Haw. —, 656 P. 2d 57 (1982), that the farmers were entitled to the full amount of water which they had enjoyed up until the time that they began to suffer injury; the Hawaii Supreme Court remanded the matter to the trial Court to make a determination of the precise amount of water to which the farmers are entitled. The trial Court has not yet ruled upon the remanded issues or fixed the quantity of water to which the farmers are entitled.

REASONS FOR DENYING THE WRIT

I. The Decision Of The Hawaii Supreme Court Is Not Reviewable Since No Final Judgment Has Been Entered.

The Hawaii Supreme Court reversed and remanded this case to the trial Court for further proceedings to make factual determinations and to award whatever relief may be appropriate. The Hawaii Supreme Court stated:

> Therefore, in applying the doctrine the trial judge should first determine the time when the increasing diversion of Waihee Streamwater first harmed the first claimant's taro cultivation. He should next determine what use was actually being made by the public of diverted streamwater just prior to that date. This amount will represent the amount of diversion which, under the public use doctrine, is not enjoinable. Diversion of the remaining water in Waihee Valley which would otherwise flow in Waihee Stream may properly be enjoined. (Footnote omitted.)
>
> 656 P. 2d at 78.

In its present posture, this case is similar to *San Diego Gas & Electric Co. v. San Diego,* 450 U. S. 621, 67 L. Ed. 2d 551, 101 S. Ct. 1287 (1981), in which this Court ruled that it lacked jurisdiction because final judgment had not been entered. Title 28 U. S. C. § 1257 grants jurisdiction to this Court to review only "[f]inal judgments or decrees rendered by the highest Court of a State in which a decision could be had".

Since the Hawaii Supreme Court reversed the decision of the trial Court and remanded the case for further proceedings, there is obviously no final judgment by the highest court of the State of Hawaii. On this ground alone, the writ should be denied.

II. There Is No Conflict Between A Federal Court Of Appeals And The Hawaii Supreme Court.

In 1973 the Hawaii Supreme Court decided the case of *McBryde Sugar Co. v. Robinson,* 54 Haw. 174, 504 P. 2d 1330, aff'd upon rehearing 55 Haw. 260, 517 P. 2d 26 (1973), cert. denied 417 U. S. 976, appeal dismissed 417 U. S. 962 (1974). *McBryde* involved a dispute between the sugar

companies over the respective amounts of water that each company had the right to divert from the Hanapepe River watershed. In that case the Hawaii Supreme Court ruled that the sugar companies have water rights, but they do not have the *right* to divert water from the watershed of the Hanapepe River to lands other than the lands to which the water rights are attached. Rather, the Hawaii Supreme Court ruled in *McBryde* that the ownership of surface waters is held in trust for the people of Hawaii for their common good, subject to the rights of all those with use rights to the water. Thus, no private individual owns water, but only has rights to the use of water. It is important to note that the Hawaii Supreme Court did *not* enjoin diversions of water out of the Hanapepe watershed, but only held that the sugar companies could not divert water under a claim of right to do so. Therefore, the Court was not in a position to determine a dispute between the sugar companies as to how much water each had a right to divert.

The sugar companies panicked when the *McBryde* decision was issued, misinterpreting it as holding that they were prohibited from transporting water away from its source for sugar cane cultivation and concluding that the State of Hawaii, through the Supreme Court, had unconstitutionally confiscated their property rights for State use. After certiorari was denied and the appeal to this Court was dismissed, they took their case to the United States District Court where they sued the Governor and other state officials to enjoin the taking of their property. The District Court accepted the sugar companies' interpretation that the *McBryde* case had done more than what the plain language said and concluded that the *McBryde*

decision resulted in a taking of the sugar companies' water rights, even though no injunction had been issued and diversions were not prohibited. The U. S. District Court, in its *de facto* review of the Hawaii Supreme Court's *McBryde* decision, held:

> Those portions of *McBryde I* and *II* holding that the State owns all surplus water and, under the aegis of the English common law doctrine of riparian rights, *restraining* the free diversion of surface waters for use outside the lands of the plaintiffs to which they are appurtenant, must be declared untenable and void. *Robinson v. Ariyoshi,* 441 F. Supp. 559, 586 (D. Hawaii 1977), *appeal pending* (Emphasis added).

The U. S. District Court even went on to remand the case to the state trial Court for further proceedings, 441 F. Supp. at 587.

The State of Hawaii appealed the decision of the U. S. District Court to the Court of Appeals for the Ninth Circuit. After hearing oral argument, the Ninth Circuit panel invoked a Hawaii Supreme Court rule and certified six questions to the Hawaii Supreme Court regarding the impact of the *McBryde* decision. The Supreme Court answered those questions in an opinion issued December 29, 1982. *Robinson v. Ariyoshi,* 65 Haw. —, 658 P. 2d 287 (1982). After the decision was issued, the sugar companies filed a Motion for Reconsideration which was denied August 15, 1983.

The Ninth Circuit should determine soon whether or not the *McBryde* decision was an unprecedented reversal of prior law which amounted to a judicial taking. However, at this time there is no conflict between the Court of Appeals for the Ninth Circuit and the Hawaii Supreme

Court which followed the *McBryde* decision in this case. Thus, review is not appropriate under Rule 17 of the Revised Rules of the Supreme Court of the United States.

III. No Substantial "Taking" Issue Has Been Presented.

The Board of Water Supply in this case continues to labor under the sugar companies' interpretation that the Hawaii Supreme Court in *McBryde* took away privately owned water rights and gave them to the State of Hawaii for its own use without just compensation. That interpretation was laid to rest by the Hawaii Supreme Court in answer to the Certified Questions from the Ninth Circuit, as follows:

> *McBryde* merely established that there was no *right* on the part of the plaintiffs to benefit from such diversions. But, as was the case in our pre-existing law governing the transport of water, diversions will be restrained only after a careful assessment of the interests and circumstances involved indicates a need for restraint. (Footnote omitted; Emphasis in original).
>
> 65 Haw. at —, 658 P. 2d at 295.

In footnote 8 of the Certified Questions the Hawaii Supreme Court also pointed out that under Hawaii case law going back to 1867, the diversion of water would be enjoined if the diversion injuriously affects the rights of others. Furthermore, the Court cited to Hawaii cases as early as 1904 holding that the party desiring to divert water bears the burden of demonstrating that the transfer will not be injurious to others. 65 Haw. at —, 658 P. 2d at 295. Thus, the *McBryde* holding that a party having water rights does not have a *right* to divert water away

from the land to which the water right attaches was neither startling nor a revolution in water rights law and was not a confiscation of private property rights for state use.

The Board of Water Supply's argument that *McBryde* was a sudden and unexpected change in property rights law is, therefore, unsupportable, since diversion of water was not prohibited and no water rights were taken for public use, as clarified by the Hawaii Supreme Court in its answers to the certified questions.

IV. There Has Been No Taking "For A Public Purpose."

In footnote 9 of its opinion in this case the Hawaii Supreme Court stated, "The ostensible use of private rights by the public is not at issue". In its Petition the Board of Water Supply interprets this language as holding that the Board of Water Supply does not have the rights of a "person" under the Fifth Amendment to the United States Constitution. That interpretation is erroneous. Rather, the Hawaii Supreme Court was pointing out that the water rights involved in the case were not taken "for public use" since the water rights involved are to be awarded to *private* parties and are not being awarded to the State for public use.

The Board of Water Supply refers to Justice Stewart's dissenting opinion in *Hughes v. Washington*, 389 U. S. 290, 19 L.Ed. 2d 530, 88 S. Ct. 438 (1967), and *dicta* in *Bonelli Cattle Co. v. Arizona*, 414 U. S. 313, 38 L. Ed. 2d 526, 94 S. Ct. 517 (1977), for the proposition that judicial action can result in a taking of private property for public use. However, both of those cases involved a claim by the states involved to title and beneficial use of real property. *Hughes* involved a dispute between the State of Washington and a private riparian owner over title to accreted shoreline.

Bonelli involved a dispute between the State of Arizona and a private party over title to a riverbed.

In the present case the dispute is between a semi-autonomous municipal water agency and private farmers; the private parties prevailed on appeal although they must await a decision on remand as to the exact amount of water to which they are entitled. It is, therefore, patently obvious that there has been no taking of private property for a *public use*. If, as the Board of Water Supply argues, it is entitled to treatment as a private "person" then the Hawaii Supreme Court settled a dispute between two private parties and no "public use" issue is raised.

—o—

CONCLUSION

The Petition fails to show that this Court has jurisdiction to hear this case since no final judgment has been entered and it fails to satisfy any of the requirements of Rule 17 of this Court. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RONALD ALBU
Legal Aid Society of Hawaii
Windward Branch
47-200 Waihee Road, Room 104
Kaneohe, Hawaii 96744
Telephone: (808) 239-5707
Counsel of Record for Respondents Charles Reppun and Paul Reppun

BOYCE R. BROWN, JR.
BROWN & DURANT
222 Merchant Street
Honolulu, Hawaii 96813
Telephone: (808) 521-5337
Counsel of Record for Respondents Robert Nakata, Seiyu Nakata, Clifford Wong and Rachael Hall